IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 441 of 1987

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

KATHI BHARATBHAI @ BABUBHAI PIPALIA DHANDHAL

Appearance:

1. Criminal Appeal No. 441 of 1987

Mr N D Gohil, APP for Appellant

Mr Manish M Buddhbhatti for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 01/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under section 378 of the Code of Criminal Procedure, 1973, is directed against judgment dated April 8, 1987 rendered by the learned Addl.Sessions Judge, Surendranagar in Sessions Case No.49 of 1986 by which the respondents are acquitted of the offences punishable under section 302 read with section 34 of IPC, section 302 read with section 120-B of IPC and section 25 (1)(a) and 29(b) of the Arms Act as well as section 135 of the Bombay Police Act.

2. Complainant-Nagabhai Rambhai Bharwad is resident of village Pipaliya, Taluka Chotila, District Surendranagar. In the morning of April 1, 1986, he had, with his buffaloes started for going to a well situated outside village to provide drinking water to buffaloes. He was required to pass through fair price shop of Kathi Chhelbhai situated in the market. While proceedings towards the well, he had noticed that respondent Nos. 1 and 2 were standing near the corner of the shop of Kathi Chhelbhai and that both of them were armed with guns. It was witnessed by him that respondent no.1 had fired a shot from gun at Giga Bava, as a result of which Giga Bava had fallen on the ground. Thereupon respondents No.2 had abetted the respondent no.1 to fire another shot at Giga Bava. Therefore, the respondent no.1 had fired another shop from gun at Giga Bava. Because of receipt of bullet injuries, Giga Bava was bleeding profusely. Further respondents No.1 and 2 had also threatened customers who had come to the shop of Kathi Chhelbhai for purchasing grocery and made them to leave the shop. Nagabhai Rambhai who had witnessed the incident had also fled the place of incident and come to his house. Meanwhile, Oghadbhai, who is brother of Nagabhai Rambhai and Bharvad Popatbhai had also come to the house of Nagabhai Rambhai and informed Nagabhai Rambhai that respondents Nos. 1 and 2 had killed Bharvad Giga Bava. Nagabhai Rambhai had thereafter gone to Chotila police station and lodged his complaint. In the complaint, it was stated that in the evening of previous day of the incident, Nagabhai Rambhai and his brother Oghadbhai were sitting in the hut belonging to deceased Giga Bava where respondent no.1 had come and demanded a goat from the deceased and as the deceased had not acceded to the demand, the respondent no.1 was annoyed and, therefore, the respondent no.1 had killed the deceased by firing shots from his gun. The complaint lodged by Nagabhai Rambhai was investigated by Natverlal Bechardas Patel, who was then PSI of Chotila police station. During investigation, it transpired that the respondent no.3 had

illicit relations with wife of Banuram Bharvad who was brother of the complainant and as Jagaram had seen the respondent no.3 going to hut of the deceased and informed the deceased about the same, a criminal conspiracy was hatched by the respondents to kill the deceased. Therefore, all the respondents were arrested. The Investigating Officer had drawn panchnama of place of occurrence and seized incriminating articles. He had also taken steps to send the dead-body of the deceased to hospital for post mortem examination. The incriminating articles were sent to Forensic Science Laboratory for analysis and necessary report was obtained. On conclusion of the investigation, the respondents were charge-sheeted in the court of learned Judicial Magistrate First Class, Chotila, of the offences punishable under section 302 read with sections 34, 302 read with section 114, section 302 read with section120-B of IPC as well as section 25(1) and 29(b) of the Arms Act and section 135 of the Bombay Police Act. As the offence punishable under section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Surendranagar for trial where it was numbered as Sessions Case no. 49 of 1986.

3. Learned Additional Sessions Judge, Surendranagar to whom the case was made over for trial, had framed charge against the respondents at Exh.3. The respondent No.1 was charged for commission of offence under section 302 IPC whereas all the respondents were charged for commission of offence punishable under section 302 read with section 34 of IPC. They were also charged of the offence punishable under section 302 read with section 114 of IPC and section 302 read with section 120-B of IPC. Further, charge for commission of offence under section 25(1)(a) and 29(b) of the Arms Act as well as under section 135 of the Bombay Police Act was also framed. The charge was read over and explained to the respondents who had pleaded not guilty to the same and claimed to be tried. The prosecution had therefore, examined -

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1. Dahyalal Devraj Tank PW 1 Exh. 7
2. Parshottambhai Punjabhai PW 2 Exh.15
3. Rashmikant Mansukhlal PW 3 Exh.19
4. Dhirubhai Abhrambhai PW 4 Exh.21
5. Viraben Gigabhai PW 5 Exh.24
6. Oghadbhai Rambhai PW 6 Exh.25
7. Nagabhai Rambhai PW 7 Exh.26
8. Jagabhai Rambhai PW 8 Exh.27
9. Kasambhai Musabhai PW 9 Exh.28

10. Hasmukhlal Thakorelal PW 10 Exh.37
11. Pethabhai Ramabhai PW 11 Exh.42
12. Bhavanishankar K Raval PW 12 Exh.43
13. Kama Karsan PW 13 Exh.45
14. Arjanbhai Harjibhai PW 14 Exh.47
15. Jivabhai Jagmalbhai PW 15 Exh.49
16. Ravubhai Dinubhai PW 16 Exh.52
17. Bhanubhai Kaduvabhai PW 17 Exh.54
18. Iqbalbhai Alambhai PW 18 Exh.56
19. Govindbhai Popatbhai PW 19 Exh.58
20. Madhurbhai Kalyanbhai PW 20 Exh.60
21. Natverlal Bechardas Patel PW 21 Exh.61

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to prove its case against the respondents. The prosecution had also produced documentary evidence such as post mortem notes of the deceased at exh.12, map of place of incident at exh.17. Notification issued under section 37(1) of the Bombay Police Act. report of ballistic expert, panchnama of place of occurrence at exh.44, inquest report at exh.46, panchnama indicating recovery of gun and cartridges at Exh.48, recovery of another gun at Exh.53, complaint lodged by Bharvad Nagabhai Rambhai at Exh.62 etc. in support of its case against the respondents.

4. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the respondents the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure, 1973. In further statement, the case of the respondents was that a theft had taken place at the residence of Jivaben who was grandmother of respondents and with reference to the said theft, witness Jagabhai Rambhai who is one of the prosecution witnesses, was got arrested by respondent no.1 and, therefore, false case was filed against all the respondents who were related to each other. It may be stated that none of the respondents had examined himself on oath, nor any other witness was examined by any of the respondents to substantiate the defence pleaded in the further statement.

5. On appreciation of evidence, the learned Judge held that it was proved beyond reasonable doubt that deceased Giga Bava had died a homicidal death. According to the learned Judge, the prosecution could not prove that respondent no.1 had committed murder of deceased Giga Bava by firing shot from a double barrel gun nor was it proved that the respondent no.2 was present at the time of the incident, nor it was proved that respondent

no.2 had instigated the respondent no.1 to fire another shot at the deceased and abetted commission of crime by respondent no.1. What was held by the learned Judge was that the prosecution could not prove that respondent no.3 had illicit relations with wife of Bhanuram Bharvard who was brother of the complainant nor it was proved by the prosecution that Jagaram had seen the respondent no.3 going to the hut of the deceased and informed the deceased about the same, as a result of which conspiracy to kill the deceased was hatched and the deceased was killed. It was also held by the learned Judge that the respondents had not committed breach of notification issued by the District Magistrate, Surendranagar under section 37(1) of the Bombay Police Act and were, therefore, not liable to be convicted of the offence punishable under section 135 of the Bombay Police Act. In view of the above-referred to conclusions, the learned Judge has acquitted the respondents by judgment dated April 8, 1987, giving rise to instant appeal.

6. Mr N D Gohil, learned Addl.Public Prosecutor contended that the evidence of the witnesses examined by the prosecution proves beyond reasonable doubt that respondent no.1 had fired first shot from a double barrel gun and second shot at the deceased on instigation and abetment from respondent no.2 and, therefore, respondent no.1 ought to have been convicted of offence punishable under section 302 of IPC and respondent Nos. 1 and 2 should have been convicted of the offence punishable under section 302 read with section 34 of IPC. What was maintained by the learned Counsel of the State Government was that the evidence led by the prosecution proves beyond reasonable doubt that respondent no.3 had illicit relations with wife of brother of the complainant and as the deceased had come to know that the respondent no.3 had gone to his hut, the respondents had hatched a conspiracy to kill the deceased and actually killed him as a result of which all the respondents should have been convicted of the offence under section 302 read with section 120-B of the IPC. According to the learned Addl.Public Prosecutor, the learned Judge of the trial court has failed to appreciate the evidence in its true perspective and, therefore, the appeal should be allowed.

7. Though the respondents are duly served, none of them has remained personally present before the Court, nor any of them has appeared through a Lawyer of his choice. Having regard to the issue involved in the appeal, the Court had requested Mr Manish M Buddhabhati, learned Advocate practising in this Court to assist the Court on behalf of the respondents. Accordingly, Mr

Manish Buddhabhati, learned Advocate has appeared in the matter on behalf of the respondents and ably assisted the Court.

8. Mr Manish Buddhabhati, learned Advocate for the respondents argued that neither Nagabhai Rambhai, who is the complainant in the case nor his brother Oghadbhai had any opportunity to witness the incident and, therefore, the well reasoned acquittal of the respondents should be confirmed by this Court. According to the learned Advocate, the prosecution had approached the Court with two different motives but could not prove either of them and absence of motive should also be taken into consideration by this Court while deciding the appeal. What was stressed was that the opinion of the ballistic expert indicates that the cartridges seized during the course of investigation could not have been fired from the guns which were allegedly in the hands of respondents Nos. 1 and 2 and, therefore, the evidence of the so-called eye witnesses becomes highly doubtful. It was argued that the deceased was a headstrong person and had many enemies in the village and, therefore, in absence of reliable evidence adduced by the prosecution, it would be hazardous to record conviction of the respondents. It was also pointed out that the record show that respondent no.3 was falsely implicated in the case and having regard to the weak nature of evidence led by the prosecution against the respondents, the appeal should be dismissed.

9. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to the broad and reasonable probabilities of the case. The fact that deceased Giga Bava had died a homicidal death can hardly be a subject matter of dispute. The evidence of Dr.Dahyalal Devraj Tank, PW 1 examined at Exh.7 would indicate that the deceased had received bullet injuries. The Doctor has enumerated in detail the injuries sustained by the deceased in his substantive evidence before the Court. The injuries sustained by the deceased are also noted in post mortem report prepared by Medical Officer Mr Tank. As per the medical evidence, the cause of death of the deceased was "cardio respiratory failure due to shock of haemorrhage due to rupture of heart and both lungs on account of gun shot fire." Further the injuries sustained by the deceased are also noted in inquest panchnama produced on the record of the case at exh.46. The learned Judge has given cogent reasons for coming to the conclusion that the deceased had died a homicidal death. Those reasons are to be found in para 9 of the impugned judgment with which this court fully

concurs. As the finding recorded by the learned Judge that the deceased had died a homicidal death, is eminently just, the same is hereby confirmed.

10. So far as guilt or otherwise of the respondents is concerned, this Court finds that it could not be proved by the prosecution that the cartridges recovered during the course of investigation could have been fired from muddamal guns. Though seven witnesses were examined by the prosecution to prove the charge levelled against the respondents, it ultimately transpires that the prosecution was relying upon the testimony of only two witnesses for the purpose of bringing home the guilt to the respondents. They are (1) complainant-Nagabhai Rambhai and (2) his brother Oghadbhai Rambhai. A bare reading of the testimony of witness Oghadbhai Rambhai makes it evident that though an attempt was made by him to establish that he had seen the incident in question, his cross-examination would show that he has no regard for truth and has changed version of the incident from time to time to suit his purpose. Further, there are material contradictions and omissions in the evidence of this witness which are amply proved by the evidence of Investigating Officer. If in fact Oghadbhai had witnessed the incident, Nagabhai Rambhai who is his real brother and who had reached his house immediately after the incident, would not have failed to mention in his complaint the fact that the incident was also witnessed by Oghadbhai. The evidence on record would show that at the relevant time i.e. when the incident had taken place Oghadbhai had gone to the house of Bhobho, who was son of the Sarpanch of the village for the purpose of taking tea with him and was not present at the place of incident. The attempt to concoct the evidence in the case is apparent. The evidence on record would establish that in fact Oghadbhai had not witnessed the incident at all but was informed about the incident by his servant when he was at the house of Sarpanch of the village. Therefore, the evidence of so-called eye witness-Oghadbhai is of no help to the prosecution.

11. As far as evidence of witness Nagabhai Rambhai is concerned, it was stated by him in his complaint that on the day of the incident, he was going to a well situated outside the village in order to provide drinking water to his buffaloes and had witnessed the incident while he was passing by the shop of Kathi Chhelbhai. According to this witness, both the respondents No.1 and 2 were armed with guns. If that was so, it is not probable that respondent no.2 would instigate respondent no.1 to fire a second shot at the deceased and the probability is that

he himself would have fired a shot at the deceased. Thus, the claim made by the witness that the first shot was fired by respondent no.1 on his own and second shot was fired by respondent no.1 at the instance of respondent no.1 does not appear to be probable. The testimony of Oghadbhai would show that his servant employed by him had taken the buffaloes to provide drinking water to them. Thus the claim made by the witness Nagabhai Rambhai that he was taking his buffaloes to a well situated outside the village and had the opportunity to witness the incident when he was passing through the shop of Kathi Chhelbhai becomes highly doubtful. There are other major contradictions appearing in the evidence of witness Nagabhai Rambhai which have been noticed by the learned Judge. Suffice it to say that the impression one gathers after reading the testimony of witness Nagabhai Rambhai is that he had no opportunity to witness the incident and he was not present when the shots were fired at the deceased. No evidence could be led by the prosecution to establish that the respondent No.3 had illicit relations with the wife of brother of the complainant and as the deceased had spotted respondent no.3 while he was going to the hut of the deceased and informed the deceased about the same, a conspiracy was hatched by all the respondents to kill the deceased.

12. This is an acquittal appeal in which the Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the case of (1) Girija Nandini devi & Ors. v. Bijendra Narain Chaudhary, AIR 1967 SC 1124, and (2) State of Karnataka v. Hema Reddy and anr., AIR 1981 SC 1417. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to sa that, the learned Judge has given cogent and

convincing reasons for acquitting the respondents and the learned Addl.Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge. Therefore, the appeal is liable to be dismissed.

13. For the foregoing reasons, this appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment. Bond, if any, executed by the respondents stands cancelled.

[J M Panchal, J.]

[D P Buch, J.]

msp